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matter concerning which the declarant was immediately and *personally* cognisant: 11 M. & W. 773. As the reason of the doctrine is the improbability of falsehood arising from the fact that men do not usually make admissions against interest, unless the truth compels them to do so, it is not indispensable that the declaration should be accompanied by an act, but if not so accompanied, this will very greatly depreciate its value. See section 4, *supra*.

4th. In addition to the other requisites, the court should be satisfied upon the circumstances of the particular case, that there was no *probable motive* to falsify the fact declared, as where the declaration is made *ante litam motem*, or at a period so remote from the controverted transaction as to preclude all suspicion that it was manufactured for the occasion: *Gilchrist vs. Martin*, 1 Bailey's Eq. 492, and cases cited in section 5, *supra*.

If these four conditions are fully met, the testimony is to be received for *what it is worth*; and its weight and value will depend upon all the attendant circumstances which characterize the declaration or admission.

J. F. D.

RECENT AMERICAN DECISIONS.

Court of Appeals of Maryland.

BALTIMORE FIRE INSURANCE COMPANY *vs.* BOUDINOT S. LONEY *et al.*

A policy of insurance containing a clause that goods held on commission must be insured as such, is to be interpreted by its own terms, and parol evidence is not admissible to show that the insurers knew the kind of business of the insured, and the character of his interest in the goods.

There was an insurance by appellant upon goods of class A. (the appellees' own goods merely), and insurance by another company on goods of classes A. and B. indiscriminately (class B. being goods held on commission). The appellants' policy contained a covenant that no greater proportion of a loss should be recovered under it than the amount thereby insured should bear to the whole amount of all the insurances on the premises. The loss on goods of class B. alone, was greater than the second company's entire insurance, and it accord-

ingly paid the full amount without reference to the classes of goods: *Held*, that the second insurance was not within the effect of the covenant for proportion, and that the appellant was not entitled to any abatement of its liability by reason thereof.

The policy contained a clause that the loss should be paid within sixty days after it should be ascertained and proved. The loss was duly proved within the sixty days, and was acknowledged by the company who offered payment of what it assumed as the amount of its liability (but in fact a smaller sum than it was bound for), and then refused to pay any larger sum: *Held*, that thereby the condition as to the sixty days was waived, and interest was due from that date on the sum for which the company was really bound.

The Baltimore Insurance Company insured Loney & Co. against loss by fire to the amount of \$5000 on goods contained in a certain warehouse, &c., "as per application."

The application was in the following form: "B. S. & W. A. Loney & Co. wish to obtain insurance to the amount of \$5000 on goods contained in the three-story warehouse," &c. The warehouse was burned, and goods destroyed to the amount of \$88,000, of which \$16,855.02 belonged to Loney & Co., as their own property, and the rest as held for sale on commission, and on the latter they had a lien for advances, &c., amounting to \$36,909.39, making their interest in the said goods, apart from that of their consignors, \$52,764.41.

The policy issued by the Baltimore company, contained clauses providing that any other insurance on the same property should be indorsed on it, which was done; and also providing that in case of such other insurance "the insured shall not, in case of loss or damage, be entitled to demand or recover on this policy any greater proportion of the loss sustained than the amount hereby insured shall bear to the whole amount of the several insurances made, or to be made, on the premises insured by this policy." One of the conditions annexed to the policy was "goods held in trust or on commission, are to be declared as such, otherwise the policy will not extend to cover such property."

In addition to this policy, Loney & Co. had others amounting altogether to \$85,000, the whole being insufficient by \$3000 to cover the value of the goods lost. All of the other policies were in language slightly varied, but amounting to the same thing,

“on merchandise their own, or held by them in trust or on commission, and sold and not delivered,” and each required goods on commission to be specified as such.

These facts were not disputed, and the sole question was as to the *amount* of liability of the insurance company. On the trial the plaintiffs (appellees) proved that when the policy was issued, they were engaged in business as commission merchants; that they were accustomed to insure goods held on commission, and that this must have been known to the company. They also gave evidence of the usual mode of settling payments for losses in such cases. The jury found a verdict for plaintiffs for \$5006.54, but both parties having excepted to the charge of the court on points presented, appealed to the present court.

William Schley, for appellants.—1. The allowance of interest was erroneous. The loss was payable in sixty days, and even if the denial of liability to the extent claimed was improper, still the time of payment, as fixed by the contract, was not thereby accelerated. If the principal was not due on May 7th, interest could not accrue from that day: *Allegre vs. Insurance Company*, 6 H. & J. 413; *Newson's Adm'r. vs. Douglas*, 7 Id. 417.

2. The other insurances covered the plaintiffs' own goods as well as those on commission. Covering both classes, they covered each, and if property of either class was destroyed, the assured was entitled to indemnity even if no part of the other class was injured. The risk was not limited to a blended loss. Therefore being other insurances on the same property, they were within the covenant, and defendants are liable only for their proportion of the loss: *Angell on Ins.*, §§ 26, 88; *Whiting vs. Insurance Company*, 15 Md. 297, and cases there cited; *Storer vs. Insurance Company*, 45 Maine 179; *Haley vs. Insurance Company*, 1 Allen 536; 1 *Phillips on Ins.* 336; 2 Id. 1263, n. 2.

3. The policy is to be construed by its terms, and they plainly limit the defendants' liability to the value of plaintiffs' own goods: *Carpenter vs. Providence Company*, 16 Peters 506; *Parks vs. Insurance Company*, 5 Pick. 33; *Insurance Company vs. Lawrence*, 2 Peters 48; 2 *Marshall on Ins.* 789; *Angell on Ins.*, § 74,

and note 4, p. 115; *Halhead vs. Young*, 36 E. L. & E. 109; *Hughes vs. Fendall*, Id. 415.

Reverdy Johnson and Wallis & Thomas, for appellees.—1. Insurance is eminently a contract of good faith. No particular form of notice was required that the goods were held on commission, and if the insurance company actually knew the fact it is immaterial how they learned it: *Insurance Company vs. Crane*, 16 Md. 260; *Insurance Company vs. Stewart*, 7 Harris 45; *Insurance Company vs. Bruner*, 11 Id. 50; *Wilson vs. Insurance Company*, 16 Barbour 511; *Marshall vs. Insurance Company*, 7 N. H. 157; *Insurance Company vs. Hewitt*, 3 B. Monroe 231; *Ætna Insurance Company vs. Jackson*, 16 B. Monr. 242.

2. The goods on which plaintiffs had a lien were their own goods within the meaning of the policy to the extent of their lien, and insurable in the name of the plaintiffs: *Insurance Company vs. Coates*, 14 Md. 285; *Russell vs. Insurance Company*, 1 W. C. C. R. 409; *De Forest vs. Insurance Company*, 1 Hall 84; *Lee vs. Barreda*, 16 Md. 198; *Insurance Company vs. Deal*, 18 Md. 47.

3. The policies, by their language, insured the plaintiffs from all loss on the goods in question. They are not so insured unless they are fully indemnified for all they would have made out of them—at least to the full extent of those belonging to them absolutely, and of their advances and commissions on those consigned. But for the condition in reference to goods held on commission, the policies would have covered the interest of the consignors as well as consignees. That condition was only intended to guard against liability for the interest of strangers, of whose integrity the underwriters knew nothing: *Waters vs. Insurance Company*, 85 E. C. L. R. 870; *De Forest vs. Insurance Company*, 1 Hall 84, 1 Arnould on Ins. 246–7; *Stilwell vs. Staples*, 6 Duer 63, s. c. 5 Smith 401.

4. The plaintiffs were entitled to apply the amount received by them from other companies whose policies covered two classes of goods, to that class not covered by the defendant's policies, and the court ought so to marshal them as to make all the policies to-

gether cover, as far as practicable, the entire loss. Contribution from "blended," or "non-concurrent policies," as they are called, is not allowed, when the effect of it would be to leave any part of the loss unpaid. The insured ought to suffer no loss so long as there is a specific policy unexhausted. Insurance Monitor 111, 112: *Kane vs. Insurance Company*, 8 Johns. 229, 236; *Bousfield vs. Barnes*, 4 Camp. 227; *Minturn vs. Insurance Company*, 10 Johns. 75; *McKim vs. Insurance Company*, 2 W. C. C. R. 89; *Haley vs. Insurance Company*, 1 Allen 536, 1 Phillips on Ins., sects. 124, 367-8.

5. The clause in reference to apportionment of losses among different companies, like the "American Clause" in marine policies, is only applicable to cases of partial loss, or of over insurance—not to a case where all the policies together amount to less than the loss sustained: 2 Phillips on Ins., sect. 1263, 1 Id. 367-8; 2 Am. Leading C. 651.

6. The other policies, insuring a gross amount on the plaintiffs' own goods, and on those held on commission, without specifying the amount intended to be insured on each, were not such as entitled the defendants to an apportionment of the loss with respect to them, and the defendants were therefore bound to the same extent as if such other policies had not been in existence: *Howard Insurance Company vs. Scribner*, 5 Hill 298.

The opinion of the court was delivered by

COCHRAN, J.—This suit was brought on a policy of insurance, issued by the appellants on the 27th of August 1855, and continued by successive renewals to the 1st of July, 1857, by which the appellees, as copartners, were insured to the amount of \$5000 against loss by fire on goods contained in the third story of a brick warehouse on Hanover street in the city of Baltimore. The policy contains a condition that it should not cover goods held in trust or on commission, unless they were so declared, and also clauses providing that other insurances on the same property should be indorsed upon it, and in case of such other insurance and of subsequent loss, that the appellees should not be entitled to demand or recover any greater portion of the loss or damage sus-

tained, than the amount thereby insured should bear to the whole amount of the several insurances effected. On the 25th of December 1855, the appellees obtained another insurance on the same goods to the amount of \$10,000, afterwards increased to \$15,000 by a policy containing the same clauses and conditions issued by the Firemen's Insurance Company of Baltimore. The property insured was subsequently removed, by permission of that company and the appellant, to No. 35 S. Charles street. Prior to the 14th of April 1857, the appellees had effected, and then held, in addition to these insurances, six other policies for an aggregate amount of \$65,000, issued by foreign companies, containing clauses requiring goods held on commission to be so specified, and in which the goods insured were substantially described as their own, or held by them for sale on commission. On the date last mentioned, the stock of goods amounting in value to \$88,113.38, on which these several insurances were obtained, was destroyed by fire. A portion of the goods amounting to \$16,855.02 belonged to the appellees, and the remainder, valued at \$71,258.36, on which they had a lien for commissions and advances to the amount of \$36,909.39, were held by them for sale on commission.

The loss was \$3113.38 in excess of the whole amount of insurance, and the portion covered by the foreign policies was paid without reference to appraisalment or contribution, leaving the balance of the loss, \$23,113.38, to be satisfied by the policies of the two Baltimore companies to the extent of their respective liabilities. The conditions of the policy as to preliminary proof, were complied with, and demand made for payment of the whole amount insured by it on the 7th day of May 1857, but the appellant, contending that its liability was limited to loss on the appellees' own goods, and proportioned thereon to the aggregate amount of all the policies, offered in satisfaction thereof to pay the sum of \$991.13, which the appellees refused to accept. Evidence was offered at the trial without exception, showing that the appellees were commission merchants chiefly engaged in selling goods consigned to them for sale on commission; that they were

generally known to be so engaged, and the custom of such merchants of keeping large quantities of commission goods in store, and also tending to show that the appellant received the application for this insurance and issued this policy with a knowledge of these facts.

Several prayers, involving the construction of the policy, were offered on both sides, all of which depend on the determination of two questions:—1st. As to the extent of the risk covered by the policy; and 2d. As to the amount of the appellant's liability upon it.

The appellees contended, on the hypothesis that the appellant knew their application was intended to be for insurance on all the goods destroyed, both their own and those held on commission, that the policy should be so construed as to give effect to that intention, or in other words, that the extent of the risk underwritten should be ascertained from the fact stated, and not from the terms of the policy.

The rule presented in this proposition we think cannot be applied here. The authorities referred to in support of the construction sought present facts so far different from those in this case, as to involve other principles. In all of them the construction turned either upon the meaning of terms, which by usage or custom had acquired a particular sense, or on evidence that insurer, after a full disclosure of facts material to the risk, and in violation of an obligation implied therefrom, neglected to insert in the policy such a reference to those facts as was essential to its validity as a contract of insurance. Parol evidence was admitted in one class, not to change or vary the contract, but to explain the meaning of the terms used, and in the other to prevent the insurer from obtaining the advantage of a contract, which through his fault, would otherwise have been without obligation and void.

The policy in this case is entirely consistent with the terms of the application, free from ambiguity, and susceptible of a consistent construction in all its parts, and if there was mistake or error in the insurance effected, it does not appear to be one attributable to the appellant, nor such as to authorize us to look beyond the

terms of the policy in ascertaining its meaning and legal effect. We think it cannot be excepted from the operation of the general rule requiring written contracts to be interpreted by their own terms, without regard to extrinsic facts: *Mumford vs. Hallet*, 1 Johns. 439; *Mellen & Nesmith vs. National Insurance Company*, 1 Hall 452, Phil. Ins. 47, 319.

The appellees appear to have obtained this insurance without making any specific statement of the nature of their interest in the goods destroyed, and had there been no express condition to the contrary, their interest in the goods held on commission might have been covered by the policy, for upon that state of fact, the material question would have been, whether the failure to inform the insured that the goods were held on commission would have affected the risk, and the admission that the communication of that fact would not have changed the rate of premium, might have been relied on as concluding it. But that is not the question here. This policy expressly provides that it was not to cover goods held on commission unless they were so declared, or as we understand it, so expressed as to appear, in some form, in the description of the goods intended to be covered by it. The right of the insurer to limit the extent of the risk by that condition cannot be doubted: *Phillips vs. Knox County Insurance Company*, 20 Ohio 174; *Briehta vs. Lafayette Insurance Company*, 2 Hall 372; 2 Am. Lead. Cases 642. And as we must presume, from the acceptance of the policy by the appellees, that they had knowledge of that condition, we think it should have the contemplated effect of limiting the risk to the goods which belonged to them.

The next inquiry is as to the amount of liability on the policy, for the loss sustained on those goods. As we have before stated, the appellees held seven other policies, six of which, issued by foreign companies, covered the goods owned by them as well as those held on commission, on blended risks to the amount of \$65,000, the remaining one for \$15,000, issued by the Firemen's Insurance Company of Baltimore, covering their own goods only. There is no question in regard to the latter policy, but as the others covered the goods of the appellees, although blended in the

risk with those held on commission, the appellant insists that they are insurances within the meaning and effect of the covenant relating to other insurances, and therefore that it is not liable for any greater portion of the loss on those goods, than the amount insured on this policy bears to the aggregate amount of all the policies.

In considering this proposition, it is proper to observe that the contract of insurance is one of indemnity, intended to protect the insured from loss, to the amount of the risk assured, whether it be one or several policies, and that in general, the provisions of the contract are favorably construed for the insured in furtherance of that principle.

The covenant in this policy limiting the liability upon it to a share of the loss in proportion to the amount of all the policies was not intended to impair the right of the appellees to the full indemnity which would otherwise be afforded by them, but to ascertain the amount of the appellant's liability, subject to that right, by an apportionment of the loss among such of the insurers of the same goods, as by the terms of their contracts should stand in the relation of co-sureties for any loss upon them. To establish that relation the policies should cover distinct and specific risks on the same subject, and in that sense constitute a double insurance upon which, without the covenant in question, the liabilities of the several insurers, except as to difference in the amounts underwritten, would be identical, and their rights to contribution reciprocal. The right to contribution is based upon the concurrence of the policies, and the necessary incident of its existence is that the several insurers should be bound with equal certainty, and in the same sense, for the same loss: *Lucas vs. Jefferson Insurance Company*, 6 Cow. 635; *Angell Ins.* 134, 135.

As we understand the authorities, this covenant relates only to policies which constitute a double insurance, or, in other words, it contemplates only such insurances as fix upon the insurers liabilities for this loss, which the insured could not resort to for the satisfaction of other losses; and the question here is, whether the foreign policies were insurances of that character.

The loss of the appellees, on the goods held on commission, exceeded the whole amount of their insurance on those policies; and if the covenant relating to other insurances be permitted to have the effect claimed, it is obvious that the right of the appellees to indemnity upon them, would be defeated to the extent of the apportionment to them of the loss sustained on their own goods. These policies, as we have seen, covered both classes of the goods, without any specific apportionment of the amounts insured to either, and the application of them under the covenant to one class only, in derogation of the right of the insured to indemnity for loss on the other, could be effected only by an arbitrary restriction of the scope and terms of the policies. The covenant proceeds on the theory that the insurers are to be discharged from some portion of their respective liabilities, by an apportionment of the loss to the several policies. In that respect it proposes a mutual and common advantage to all the insurers affected by it, entirely consistent with the protection of the insured, and there is no apparent reason why it should be permitted to have effect upon other insurances, when, from the nature of the case, the common advantage contemplated by it becomes impossible. An apportionment to the foreign policies of the loss on the goods covered by this policy, without any reciprocal operation in the way of releasing the foreign insurers from any portion of the amounts of their several liabilities, would effect a disproportionment of the risks to the rates of insurance on the respective policies by a practical reduction of the appellant's liability. In that aspect of the case, the appellant alone would derive the benefit of a condition intended to operate for the common advantage of such other insurers as might be affected by it. It cannot be pretended in that view, that the appellant and foreign insurers were bound with equal certainty and in the same sense for the loss on the appellees' goods, or that there was any mutuality in their relations and rights as insurers of the same subject. We do not wish to be understood as saying that the insurers on the home and foreign policies could, under no circumstances, have been equally bound and liable as co-sureties for that loss, for had the

loss on the commission goods been less than the amount of insurance on the foreign policies, it might well be said that the excess of that insurance would have been applicable to the loss insured against by the home policies, and the liabilities and rights of the foreign insurers, to the extent of that excess, identical with those of the home insurers. But in this case the loss on the commission goods was sufficient to exhaust all the policies covering them; and as the insurers on the home and foreign policies, in view of the right of the insured to full indemnity, became subject to different liabilities by the loss as it occurred, we think the foreign policies were not within the effect of the covenant relating to other insurances, and that the appellant is not entitled to any abatement of its liability on this policy by reason of them: *Haley vs. Dorchester Mutual Insurance Company*, 1 Allen 536; *Howard Insurance Company vs. Scribner*, 5 Hill 298.

The objection made to the allowance of interest from the 7th of May, 1857, when payment was demanded, is founded on a clause contained in the 9th condition of the policy providing for the payment of loss within sixty days after the same should be ascertained and proved. There was no dispute as to the right of the appellees to interest after the time fixed for payment by that condition, it being an established rule that interest may be claimed from the time the principal sum becomes payable by the terms of the policy: *McLaughlin vs. Washington County Mutual Insurance Company*, 23 Wend. 525; *Hallet vs. Phoenix Insurance Company*, 2 Wash. C. C. R. 279. The principle involved is the same as in cases where, by the expiration of the time limited for the payment of a principal sum, interest becomes payable for the time the sum due may be withheld; and the objection made to the allowance of interest in this case, presents the question whether the amount to be paid on this policy was due and recoverable on the day from which the interest allowed was computed. We have no doubt on that point. It appears from the statement of facts made by agreement of the parties that the conditions of the policy as to preliminary proof, were complied with, and a demand of payment made on the date mentioned, and that the appellant

thereupon admitted the loss, and offered payment of what it assumed to be the amount of its liability, but in fact a less sum than it was bound for, and then denying all further obligation on the policy, refused to pay any other larger sum.

Upon these facts we must hold that the condition as to the time of payment was waived, and that the sum for which the appellant was bound then became due and recoverable. In our opinion, the allowance of interest is not open to objection.

From our examination of the whole case, we conclude that the first and second prayers of the appellant, and the sixth of the appellees, were properly granted, and that there was no error in the rejection of the others.

Judgment affirmed.

I. Questions concerning the right of a person to insure in his own name, goods not belonging to him, have been productive of frequent litigation, and of many attempts to fix with accuracy the nature and amount of an "insurable interest." It appears, however, to be now well settled, that a consignee, factor, or agent, may insure in his own name, to the amount of his lien for advances, &c., whether these advances were upon the special goods insured, or on a general balance: 1 Phillips on Insurance, ch. 3, § 7; Parks vs. General Insurance Co., 5 Pick. 33. And it seems to be the better opinion that, if he has a general authority over the goods, as a commission merchant over goods in his hands for sale, he may insure to the full value in his own name, and will recover the excess over his lien, for the benefit of the owners.

For this latter position the leading authority, and indeed the most exhaustive summary of the whole subject, is the case of De Forest vs. The Fulton Fire Insurance Co., 1 Hall 84, decided by the Superior Court of the city of New York, in 1828, after elaborate argument and mature consideration. In that case

the policy was for an insurance against loss on goods, "as well the property of the assured, as held by them in trust or on commission." The plaintiff's right to recover was not disputed so far as the amount of his advances was concerned, and the question was plainly presented, whether the advances were the proper guide to the measure of damages, or whether the plaintiff could recover for the full value of the goods, or in other words, *what was the insurable interest of the plaintiff*. The court held that a commission merchant, having goods in his possession for sale, has an interest in them which entitles him to insure them *in his own name* to their full value.

It is to be noticed, however, that the question as to whether the interest was within the terms of the contract did not arise, as the policy was expressly upon goods held in trust or on commission, as well as on those held in the plaintiff's own right. In most of the cases the question has been complicated by the additional point, that goods held on commission were not within the meaning of the policy, if insurable at all.

The doctrine of this case has been generally followed, though not without

hesitation and strenuous opposition. In *Millaudon vs. Atlantic Insurance Co.*, 8 La. 557, a policy on "stock in trade" was held to cover the whole value, although the insured only owned a half interest as partner, and had a lien on the rest for advances. And in *Duncan et al. vs. Sun Mutual Insurance Co.*, 12 La. An. 486, it was said that if it appears that the intention was to insure for the benefit of any one in interest, though not named, the interest is not to be defeated by want of technical or even customary phrases; but, otherwise, if the most natural construction of the policy is, that the insured sought to protect only his own interest—citing with approval *De Forest vs. Fulton Insurance Co.*

De Forest vs. Fulton Insurance Co. has also been cited and approved in other cases, both directly and incidentally (*Van Natta vs. Mutual Security Insurance Co.*, 2 Sandf. 490; *Stilwell vs. Staples*, 5 E. P. Smith 401, and others, *infra*), so that it may be considered not only to have first announced, but also firmly established the doctrine of the right of a consignee, &c., to insure in his own name, to the full value of the goods; and Mr. Angell, in his treatise on insurance, adopting the language of PIRTLE, Ch., in *Jackson vs. Ætna Insurance Co.*, 2 Am. Law Reg., Old Series 374, says: "The mode of making insurance in the case of *De Forest vs. Fulton Fire Insurance Co.*, has never been doubted in this country since the elaborate judgment in that case." (Sect. 75 a.)

II. The question presented by the principal case, however, is not so much the extent of insurable interest in a commission merchant which may be regarded as settled, as the effect of the common clause in the policy requiring goods held on commission to be insured as such, where there is knowledge on

the part of the insurer that the goods are so held, or other evidence to prove either a waiver or a substantial compliance with this condition.

It is said by Mr. Phillips (*Insurance*, ch. 1, § 10), that "the subject-matter of marine insurance and other mercantile contracts, makes it necessary to go out of the written instrument in order to interpret it, more frequently than in most other contracts," and some strong cases are given by him of words allowed to be explained by evidence dehors the writing; but they are all on the ground of usage to explain latent ambiguity—a recognised exception to the general rule of interpreting contracts. And, again, there are many cases in which equity has interfered to reform a contract which appears clearly to be different from that which the parties to it intended.

Cases are not wanting, therefore, in which clauses in policies of insurance, and not unfrequently the very clause in the principal case, concerning commission goods, have been construed with great liberality, allowed to be explained or varied by parol evidence, or altogether reformed by the equitable powers of the court. Thus, in *Franklin Fire Insurance Co. vs. Hewitt et al.*, 3 B. Monroe 231, the appellees had applied for insurance on "their stock of merchandise generally contained," &c., in a building used by them "as a commission house." An agent of the insurance company took the application, and knew of the character of the stock, business, &c., but the company had sent a policy with the clause requiring goods on commission to be expressly insured as such. It was held that the appellees had an insurable interest, and that the policy could be decreed by a Court of Equity to include commission goods. And in *Jackson vs. Ætna Insurance Co.*, 2 Am.

Law Reg. O. S. 374, in the Court of Chancery of Louisville, the expression "stock of a pork house," was held to be equivalent to mention of the fact, that some of the goods were not the plaintiff's, but were held on commission; *PIRTLE*, Ch., citing *Franklin Insurance Co. vs. Hewitt*, to show that a literal compliance with the condition was not necessary. And in the same case on appeal (16 B. Monroe 242), though the decree was somewhat varied, substantially the same ground was taken, the court going the full length of the doctrine in *De Forest vs. Fulton Insurance Co.*

In *Howard Insurance Co. vs. Bruner*, 11 Harris (23 Penna. State) 50, the policy contained a clause that it was "made and accepted in reference to the conditions thereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties," &c., and among these conditions was one that, "when a policy is made and issued upon a survey and description of certain property, such survey and description shall be taken to be part and portion of such policy, and warranty on the part of the assured." In the written description on which the policy was issued there were important errors and omissions, but the plaintiffs were allowed to give evidence that their verbal description to the agent of defendants was correct, and that the written description was made out by the agent who knew from a survey all about the property, and omitted part of the description, considering it immaterial.

In *Peoria Insurance Co. vs. Hall*, ante p. 417, where a policy was conditioned, that if gunpowder was kept without written permission in the policy, the policy should thereby become void, the Supreme Court of Michigan held, that if the agent at the time of taking the insurance knew that powder was kept in the store, the

issuing of the policy was a waiver of the condition, and it was not necessary that the permission should be given in the policy. In *Protection Insurance Co. vs. Wilson*, 6 Ohio St. 553, insurance was made on a common blank of a river policy, against "perils of seas, rivers, fire, jettison," &c., and the court allowed parol evidence to show that this was meant to include canal navigation, as the company's agent knew that this insurance was on a canal voyage.

On the other hand, in *Beacon Fire Insurance Co. vs. Gibb et al.*, 9 Jurist N. S. 185 (s. c. 1 Moore P. C. C., N. S. 73), the insurance was on a steamboat, but the policy was a printed form used for houses, and contained a clause, that "if more than twenty pounds of gunpowder should be on the premises at the time when any loss happened, such loss should not be made good." The vessel had one hundred pounds of powder on board at the time of her burning, but it was admitted that the powder was not in any way the cause of the loss. The plaintiff contended that as the boat was a trading boat, and it was the usage of such boats to carry powder, and *both facts being known to the company when making the insurance*, the clause did not apply, and the jury in finding the fact of the powder being on board, added, "which the owners of the said steamer were not precluded by their policy from carrying." The court however struck out this last sentence from the verdict as surplusage, and determined that the construction was for the court, and parol evidence was not admissible. On appeal it was held by the Privy Council, Lord CHELMSFORD delivering the opinion, that the word "premises" applied to the steamboat, and it appeared to be conceded without question, that the exclusion of parol evidence was correct.

Again, in *Mellen et al. vs. National Insurance Co.*, 1 Hall 452, it was held

that the charterer of a vessel cannot insure the amount of his charter-money under the general name of freight. The policy is evidence of the contract, and parol proof cannot be admitted to show that the plaintiff under the name of freight intended to insure the profits on his charter-party.

These may be considered the principal American cases, in which the apparent meaning of the language of policies has been allowed to be varied by liberal construction, or by the introduction of parol evidence, and though some of them do not announce very clearly the general rule on which they stand, yet they may all be brought within the usual exceptions of ambiguity or mistake, and

therefore show that there is no general principle of construction of policies of insurance different from that governing other contracts. The court, therefore, in the principal case, in refusing to look beyond the writing, merely applied the general rule, though perhaps somewhat more stringently than was done in some of the cases we have discussed, which appear to have been decided on a liberal reading of the principle announced by Mr. Angell (Insurance, ch. 4, § 75 a,) from Jackson *vs.* Aetna Insurance Co., that it is sufficient if the clause requiring goods held on commission to be insured as such, "is substantially complied with." J. T. M.

Supreme Court of New Jersey.

DAVID TELFER, ADMINISTRATOR, *vs.* THE NORTHERN RAILROAD COMPANY.¹

Where a party sues for damages caused by negligence of another, he must show that he was not himself guilty of such negligence, or want of reasonable care as contributed to the injury done.

Where a person in crossing a railroad track is injured by collision with the train, the fault *primâ facie* is his own, and he must show affirmatively that it is not, before he is entitled to recover damages for the injury.

In an action by surviving relatives for death caused by negligence, the amount of damages is to be measured by the *pecuniary loss* merely, and in estimating that, the chances of health and life are to be considered as well as the value of services.

The reciprocal duties of railroad companies and persons crossing the track discussed.

The opinion of the court was delivered by

VAN DYKE, J.—These two suits were tried together, and were brought by the father to recover compensation in money for the loss of his sons, who were killed by coming in collision with a locomotive and train of cars. It is difficult to look at these suits in the light of mere actions for damages, without being influenced

¹ We are indebted for this case to the courtesy of A. O. Zabriskie, Esq.